which I have earlier set out, should, in my judgment, as a matter of law, have dismissed the action on the ground that the respondents had failed to prove, as they had alleged in their pleadings, that the ladder slipped while the deceased was descending it, thereby causing the deceased to fall. In other words the respondents had failed to prove that the deceased's death was attributable to the negligence of the appellants. In this connection it is pertinent to observe that at no stage of the proceedings did the respondents rely on the principle or rule of *res ipsa loquitur* and I do not therefore have to consider it.

For all these reasons I am impelled to the conclusion — though with regret — that the appeal must succeed with costs here and below.

Tan Ah Tah F.J. and **Ambrose J.** concurred.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Williams & Co.*

TAY SAI HIANG v. TAN EE KEOK

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) February 16, 1968]

[Singapore — Federal Court Civil Appeal No. Y. 50 of 1967]

Landlord and Tenant — Unlawful construction by tenant — Conviction of landlord for offence under Municipal Ordinance — Landlord applying for possession under Control of Rent Ordinance — Exposure to penalty, fine or forfeiture — Municipal Ordinance (S.S. Cap. 133), ss. 144(7)(10)(12) and 392 — Control of Rent Ordinance (Cap. 242), s. 15(1)(h).

This was an appeal by a landlord against the dismissal of her claim for the recovery of possession of a rent controlled premises. The respondent tenant had contravened section 144(7) of the Municipal Ordinance by knowingly reconstructing three water tanks on the premises without an approved plan. The appellant, as landlord, was convicted and fined for the offence. In an action for the recovery of possession of the premises under section 15(1)(h) of the Control of Rent Ordinance, the trial judge held that the appellant had not discharged the onus of proving that the breach of the Municipal Ordinance had exposed her to a fine. This was because she had failed to show that the complaint against her was made within the time specified in section 392 of the Municipal Ordinance.

Held: once the appellant had proved that she had been convicted of an offence, it must be assumed until the contrary was proved, that the appellant was exposed to a fine. The burden was therefore not on the appellant to prove that the complaint was made within the requisite period of twelve months, but on the respondent to prove that the complaint was not made within the requisite period of twelve months.

Cases referred to:—

(1) *Hooi Chuk Kwong* v. *Lim Saw Choo* [1958] M.L.J. 5.

(2) *Ho Tong Cheong & Ors.* v. *Oversea-Chinese Banking Corpn. Ltd.* [1967] 2 M.L.J. 70.

(3) *Sarah Cashin* v. *Goh Kah Seng* [1955] M.L.J. 52.

FEDERAL COURT.

C. S. Wu for the appellant.

J. F. McWilliam for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: The appellant, the owner and the landlord of rent-controlled premises known as No. 720-E Upper Serangoon Road, Singapore, claimed possession of the premises from the respondent, the tenant of the premises. She claimed she was not precluded from recovering possession by virtue of *inter alia* section 15(1)(h) of the Control of Rent Ordinance (Cap. 242) on the ground that the respondent had knowingly committed a breach of section 144(7) of the Municipal Ordinance by constructing three brick water tanks on the premises without a plan and specification having been approved by the proper authority and that this breach had resulted in her being prosecuted, convicted and fined for an offence under section 144(10) of the Municipal Ordinance.

It is convenient at this stage to set out the material provisions of the Control of Rent Ordinance (Cap. 242) and the Municipal Ordinance.

Section 15(1)(h) of the Control of Rent Ordinance provides as follows:—

"15. (1) In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases, namely:—

(h) where the tenant or any other person occupying the premises under him has knowingly committed a breach of any written law regulating any business carried on upon the premises or of any provision of the Municipal Ordinance or of any rule or by-law made thereunder affecting the premises which exposes the landlord to any penalty, fine or forfeiture;".

The material provisions of section 144 of the Municipal Ordinance are as follows:—

"(7) No person shall commence any building operations involving the erection of a building . . . . unless —

x x x

(b) a plan and specification of the building have been approved by the Commissioners or the President within one year before the date of the notice."

"(10) Any person who —

(a) commences or resumes building operations in contravention of subsection (7);

shall be liable to a fine not exceeding three hundred dollars and to a daily fine of ten dollars for every day on which the offence is continued after conviction, and a Police Court may, on the application of the Commissioners, make a mandatory order requiring such person to alter in any way or demolish the building."

"(12) Where any building operations are commenced or carried out in respect of any building, they shall be deemed to have been commenced or carried out by the owner of the land whereon such building is erected and he shall be liable therefor."

It is also necessary to consider section 392 of the Municipal Ordinance which provides as follows:—

"392. Except in any case where by reason of the act or omission complained of an injury or danger to health subsists at the date of the complaint no person shall be liable to any fine or penalty under this Ordinance or under any rule or by-law made thereunder for any offence under this Ordinance unless the complaint respecting such offence is made within twelve months next after the commission of such offence."

The trial judge found the following facts proved. At the end of 1962 the respondent reconstructed three brick water tanks on the remnants of three tanks which had previously been built and used them to store water because of the prevailing water shortage. The respondent re-constructed these tanks without a plan and specification having been approved by the proper authority as required by section 144(7) of the Municipal Ordinance. An offence punishable under section 144(10) had therefore been committed. The respondent knew that it was an offence under the Municipal Ordinance to re-construct the tanks without proper plans being submitted and approved. A summons respecting this offence was issued against the appellant on the 19th September 1964 and on her plea of guilty she was convicted on the 21st October 1964 and fined $25. There was no evidence of the date when the complaint against her respecting the offence had been made.

On these facts the trial judge held that although the appellant had proved that the respondent had knowingly committed a breach of section 144(7) of the Municipal Ordinance, this breach did not expose her to a fine as she had failed to prove that a complaint against her respecting the offence in question was made to a magistrate within twelve months next after the commission of the alleged offence.

The trial judge was of the view that although, because of the respondent's breach of section 144(7), the appellant was exposed to prosecution for an offence under section 144(10) by reason of the deeming provisions of section 144 (12), there was no exposure of the appellant to conviction until a complaint against her was made to a magistrate and if the complaint was made more than twelve months after the commission of the alleged offence, the appellant was not liable to any fine. He held that as the appellant had failed to prove in the action that a complaint respecting the offence in question was made against her within twelve months next after the commission of the alleged offence, the facts which would support a conviction of the appellant did not exist. Accordingly as she was not exposed to conviction, she was not exposed to any fine and on the authority of *Hooi Chuk Kwong* v. *Lim Saw Choo* [1] the appellant's claim for possession under section 15(1)(h) of the Control of Rent Ordinance must fail.

This court had occasion also to consider the decision in *Hooi Chuk Kwong* v. *Lim Saw Choo, supra,* in the case of *Ho Tong Cheong & Ors.* v. *Oversea-Chinese Banking Corpn. Ltd.* [2] where Buttrose J. with whose judgment the other members of the Federal Court concurred, said at page 72:—

"I think perhaps I should add that exposure to a penalty, fine or forfeiture means that there must be exposure to conviction, exposure to prosecution is not enough, and there is no exposure to conviction unless facts exist which would support a conviction. This was made clear in the Federation Court of Appeal decision in *Hooi Chuk Kwong* v. *Lim Saw Choo* which on this point dissented from the judgment of Whitton J. in *Sarah Cashin* v. *Goh Kah Seng, supra.*"

Before us, counsel for the appellant contends that the trial judge was wrong in holding that the onus was on the appellant to prove that the the complaint respecting the offence was in fact made within twelve months next after the commission of the alleged offence. Counsel contended that the onus lay on the respondent as it was the respondent who had alleged that the complaint, which necessarily precedes the issue of a summons, might not have complied with section 392 of the Municipal Ordinance. I agree with this contention. It was not in dispute and evidence was led that the appellant had in fact been prosecuted by way of a summons before a magistrate's court and had in fact been convicted of and fined for an offence under section 144(10) in respect of the respondent's breach of section 144(7) of the Municipal Ordinance. In my opinion once a person is convicted of and fined for an offence he must necessarily have been exposed to conviction and exposed to a fine in respect of that offence. In any event, once a person has proved that he has been convicted of an offence it must be assumed until the contrary is proved, that all the facts necessary which, if proved, would lead to a conviction, have been proved to the satisfaction of the court trying that person in respect of that offence. The burden is therefore not on the appellant to prove that the complaint was made within twelve months next after the commission of the offence but on the respondent to prove that the complaint was not made within the requisite period of twelve months. I must not be taken as holding the view that if the respondent had satisfactorily discharged this onus, the appellant's case under section 15(1)(h) of the Control of Rent Ordinance must necessarily fail. That point was not argued and does not arise on the evidence and I therefore do not propose to deal with it. For the purposes of the present appeal it is sufficient for me to come to the conclusion that on the facts as found by the trial judge it must be assumed that the appellant was exposed to a fine by reason of the respondent's breach, knowingly of section 144(7) of the Municipal Ordinance.

The respondent seeks to uphold the judgment in his favour by contending that the trial judge's finding of fact that he knew it was an offence under the Municipal Ordinance to re-

construct the three water tanks in question was wrong as being unjustified on all the evidence before him. I need only reaffirm that a question of fact is pre-eminently a matter for the trial court and I have not been persuaded that the reasons given by the trial judge are unsatisfactory or that there was any misdirection of himself or that he had not drawn the proper inferences.

For all these reasons I would allow the appeal with costs here and in the court below.

Tan Ah Tah F.J. and **Winslow J.** concurred.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Laycock & Ong.*

EMPLOYEES PROVIDENT FUND BOARD v. BATA SHOE CO. (M) LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) February 19, 1968]

[K.L. — Federal Court Civil Appeal No. X. 84 of 1966]

Provident Fund — Liability of employer — "Contract of service" — Validity of contract between parties — Employees Provident Fund Ordinance, 1951, s. 2.

Contract — Freedom of — "Avoidance" and "evasion" — "Authority" and "power".

This was an appeal against the decision of Gill J. ([1967] 1 M.L.J. 120) who had held that there was no relationship of employer and employee between the Bata Shoe Co. (M) Ltd. and the salesmen employed by the managers of the company's retail shops. Under the agreement between the company and the managers, the managers were given power to employ persons to assist them and it was stated that the managers would be responsible for payments under the Employees Provident Fund Ordinance.

Held, dismissing the appeal: (1) construing a "contract of service" in section 2 of the Employees Provident Fund Ordinance does not require the court to go beyond ascertaining whether such a contract existed or not, to the extent of exploring the wider field of an employee's liability for the unauthorised acts of putative agents;

(2) the contract between the company and the managers was a valid one and it was clear that under it the managers and not the company were the employers and therefore the company was not liable to contribute to the Employees Provident Fund.

Cases referred to:—

(1) *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, 480.

(2) *Levene* v. *Inland Revenue Commissioners* [1928] A.C. 217, 227.

(3) *Bullivant* v. *Attorney General for Victoria* [1901] A.C. 196, 207.

(4) *Scammell* v. *Ouston* [1941] A.C. 251, 272.

(5) *Allen* v. *Thorn Electrical Industries Ltd.* [1967] 3 W.L.R. 858.

FEDERAL COURT.

Yong Pung-How for the appellants.

M. Shanker for the respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal by the Employees Provident Fund Board against the judgment of Gill J., declaring that there was no relationship of employer and employee, within the terms of the Employees Provident Fund Ordinance, 1951, subsisting between the Bata Shoe Company (Malaya) Ltd. and salesmen employed by managers of the company's retail shops and declaring, further, that the company was and is under no liability to make contributions to the board's fund in respect of such employees.

Originally the main grounds of appeal were: (a) that, having found as a fact that the retail shop managers were themselves employees of the company, the learned judge should have found that the shop employees were also employees of the company; (b) that, notwithstanding the absence of an express contract between the company and such employees, yet, *vis-a-vis* the board, these employees should be deemed to be in law the employees of the company, and (c) that the learned judge should have held them to be the company's employees since they came to be employed as such "through the agency of the shop managers acting within the scope of their authority."

Application was subsequently made, after time, to add a further ground as follows:—

> "That the provision in clause 9 of the shop manager's contract to the effect that he is the employer of such salesmen, etc., should be rejected as repugnant to the contract as a whole, as a servant who has authority to employ other servants about his master's business, *must necessarily have authority to create a contract between such other servants and his master.*"

The application was stoutly opposed by counsel for the appellant, who submitted that, on the authorities cited by him, the principle which appears to be established is that a new point of law will not be allowed to be raised for the first time on appeal, even though such point related only to the construction of documents. The majority view in this court being in favour of allowing the application, I need only say that I concurred, without having formed any definite conclusions as to the principles deducible from the many cases cited to us. For my own part, however, I should add that I respectfully incline to the views expressed by Lord Watson in *Connecticut Fire Insurance Co.* v. *Kavanagh*,[1] particularly as, in the instant case, I think no artificial barriers should be erected so as to prevent the agreement being considered as a whole.

Before discussing the grounds of appeal I would, with respect, express, first of all, my admiration of the judgment delivered by the learned judge, than which I have rarely seen a better, and next, my deep indebtedness to learned counsel on both sides for the great assistance afforded me by their written submissions which,